

## **APPENDIX A**

### **~~THIRD~~FOURTH AMENDED AND RESTATED CERTIFICATE OF INCORPORATION OF NEW YORK MERCANTILE EXCHANGE, INC.**

New York Mercantile Exchange, Inc. (hereinafter referred to as the “Corporation”), which was originally incorporated in the State of Delaware on May 11, 2000, hereby certifies that this Third Amended and Restated Certificate of Incorporation was duly adopted in accordance with the provisions of Sections 242 and 245 of the General Corporation Law of the State of Delaware. This Third Amended and Restated Certificate of Incorporation amends, restates and integrates the provisions of the Corporation’s amended and restated certificate of incorporation as hereby amended. The text of the amended and restated certificate of incorporation as heretofore amended is hereby restated to read in its entirety as follows:

#### **ARTICLE I NAME**

The name of the corporation is New York Mercantile Exchange, Inc.

#### **ARTICLE II REGISTERED AGENT**

The address of the registered office of the Corporation in the State of Delaware is 1209 Orange Street, City of Wilmington, County of New Castle, Delaware 19801. The name of the registered agent of the Corporation at such address is The Corporation Trust Company.

#### **ARTICLE III CORPORATE PURPOSES**

The nature of the business or purposes to be conducted or promoted by the Corporation are to engage in any lawful act or activity for which corporations may be organized under the Delaware General Corporation Law (as amended from time to time, the “DGCL”).

#### **ARTICLE IV MEMBERSHIP**

*A. General.*

The Corporation shall have no authority to issue capital stock. The terms and conditions of membership in the Corporation shall be as provided in or pursuant to this Certificate of Incorporation, the Bylaws of the Corporation (the “Bylaws”) and the Rules and Regulations of the Corporation as in effect from time to time (the “Rules”).

*B. Classes and Series of Membership.*

The membership interests that the Corporation shall have authority to issue shall consist of not more than 816 Class A Memberships (the “Class A Memberships” and the owners thereof, the “Class A Members”) and one Class B Membership (the “Class B Membership” and the owner thereof, the “Class B Member”). The terms, conditions, preferences and rights of the Class A Memberships and the Class B Membership shall be as set forth in this Certificate of Incorporation, the Bylaws and the Rules. The Class A Members shall not have the right to vote on any matter, except as and to the extent provided in Article IX of this Certificate of Incorporation. The Class A Members shall have no interest in the profits of the Corporation and shall have no right to receive any dividend or other distribution (including upon liquidation, dissolution, winding-up or otherwise) to be declared, paid or distributed by the Corporation or the right to receive any consideration upon the merger or consolidation of the Corporation, which rights shall be vested solely in the Class B Member. Except to the extent (if any) required by law and Article IX of this Certificate of Incorporation, the Class B Member shall have the exclusive right to vote on any matter to be voted on by the members of the Corporation. The Class B Member shall have the exclusive right to receive any dividend

or other distribution (including upon liquidation, dissolution, winding-up or otherwise) to be declared, paid or distributed by the Corporation or any consideration upon the merger or consolidation of the Corporation. The Class B Membership initially shall be held by CMEG NYMEX Holdings Inc., a Delaware corporation. The Board of Directors of the Corporation shall have the authority to create additional classes of memberships with such rights and limitations as the Board of Directors determines. Each Class A Member shall be entitled to one vote for each Class A Membership on any matter on which such Class A Member is entitled to vote. Each Class B Member shall have one vote on any matter on which such Class B Member is entitled to vote.

C. *Class A Member Trading Rights.*

Holders of Class A Memberships who meet the applicable membership and eligibility requirements set forth in this Certificate of Incorporation, the Bylaws and the Rules shall have (i) the rights to trade on the ~~open outcry and~~ electronic facilities of the Corporation (and owners thereof shall have the right to lease such rights) in each case in compliance with this Certificate of Incorporation, the Bylaws and the Rules and (ii) the other rights set forth in this Section (C) of this Article IV of this Certificate of Incorporation.

1. *Classes of Memberships.*

The Corporation shall not increase the number of Class A Memberships to a number greater than 816. The Corporation shall not create any new class of memberships in the Corporation with any rights to trade or to broker trades of any futures and options products that were traded on the Corporation's open outcry trading system as of July 18, 2008, on the open outcry facility of the Corporation.

2. *Clearing Members.*

In addition to any Rules or other qualifications set forth by the Corporation, a Member Firm, as so designated pursuant to the Rules, shall hold not fewer than two (2) Class A Memberships in order to qualify (a) as a Clearing Member, as such term is defined in the Rules, and (b) for member rates.

3. *Transaction Fees.*

The transaction fee for Class A Members trading futures and options products that were traded on the Corporation's open outcry trading system and/or electronic trading system as of July 18, 2008 for their accounts, whether utilizing the open outcry trading system or the electronic trading system, shall be lower than the transaction fees charged to any participant who is not a holder of a Class A Membership for the same product; provided, however, that the foregoing shall not prohibit the Board of Directors of the Corporation from establishing transaction fees on a non-permanent basis in connection with a market maker program or other programs designed to build market liquidity. This fee differential shall be maintained for so long as either Chicago Mercantile Exchange Inc. or Board of Trade of the City of Chicago, Inc. maintains a comparable fee differential.

Each Member Firm, as so designated pursuant to the Rules, shall receive member rates on trades for any account wholly-owned by such Member Firm independent of the identity of the individual that executes the relevant trade.

Each Individual Member, as so designated pursuant to the Rules, shall receive member rates for trades on any account wholly owned by such Individual Member, or any account jointly owned if all owners of such account are holders of Class A Memberships; provided that a holder of a Class A Membership executes the relevant trade. Additionally, for each Class A Membership owned or leased by an Individual Member, such member shall receive member rates for products traded electronically in such account for no more than three (3) individuals (in addition to the owner) to whom such owner or for no more than one (1) individual (in addition to the lessee) to whom such lessee assigns power of attorney rights pursuant to the Rules.

~~4. *Open Outcry Facility-RESERVED*~~

~~The Corporation shall maintain facilities for an open outcry market for the trading (the "Trading Floor") of futures and options contracts traded on the Trading Floor as of July 18, 2008 (the "Current Products") until December 31, 2012. Following December 31, 2012, at any time following the end of the first full fiscal quarter as to which the Trading Floor does not satisfy the financial tests set forth below for such quarter (the "Quarterly Financial Tests"), the Corporation shall have the right to close the Trading Floor. Prior to closing the Trading Floor, the Corporation shall have the right to close any individual trading ring and terminate open outcry trading of any Current Products traded in such trading ring, if the Trading Floor would have satisfied the Quarterly Financial Tests for the immediately preceding fiscal quarter, on a pro forma basis, assuming that~~

~~such trading ring was closed as of the first day of the testing period. The Corporation shall measure the Quarterly Financial Tests within sixty (60) days following each full fiscal quarter. The Corporation shall give the Class A Members at least thirty (30) days' notice of the closing of the Trading Floor or any trading ring.~~

~~In the event that the Trading Floor does not satisfy both of the tests set forth below at the end of any fiscal quarter, it will be deemed to have failed the Quarterly Financial Tests for that fiscal quarter.~~

~~(a) Revenue~~

~~The Revenue from the Trading Floor generated during the fiscal quarter for which the financial test is being measured and the immediately preceding quarter must exceed 50% of the Revenue from the Trading Floor for fiscal 2007 divided by two (2).~~

~~(b) Profitability~~

~~The Trading Floor After Tax Profit Margin for the fiscal quarter for which the financial test is being measured and the immediately preceding quarter must equal or exceed 50% of the CME Group Inc. After Tax Profit Margin for that same period.~~

~~For purposes of this calculation:~~

~~“Revenue from the Trading Floor” means the transaction fees, clearing fees (if separately charged), and other direct ancillary fees (e.g. booth rental) generated from open outcry trading on the Trading Floor.~~

~~“Trading Floor Expenses” means the direct expenses incurred to operate the Trading Floor, including but not limited to facility costs including rent (or implied rent), utilities, taxes, security, insurance, telecommunications costs, amenities; trading expenses including market surveillance for Trading Floor trades, license fees, market maker fees, data vendor fees, and all computer software and hardware costs (including maintenance fees); depreciation on capital expenditures at the Trading Floor; staff and direct management of the staff for the Trading Floor; and all applicable city, state and federal taxes associated with the income or revenue generated from the Trading Floor.~~

~~“Trading Floor After Tax Profit Margin” means the percentage derived by dividing (1) Revenue from the Trading Floor net of Trading Floor Expenses by (2) Revenue from the Trading Floor for the applicable period.~~

~~“CME Group Inc. After Tax Profit Margin” means the percentage derived by (1) multiplying (x) CME Group Inc.’s consolidated operating income for the applicable period by (y) the difference between 1 (one) and CME Group Inc.’s effective corporate tax rate and (2) dividing that amount by CME Group Inc.’s consolidated total revenues for the applicable period. The amounts shall be obtained or derived from the financial statements included in the applicable quarterly or annual reports filed by CME Group Inc. with the Securities and Exchange Commission.~~

~~The Trading Floor shall be the exclusive venue for the open outcry trading for Current Products for so long as such products are traded on the Trading Floor. The Corporation is under no obligation to provide a backup or alternative facility for open outcry trading if the Trading Floor is rendered inoperable for any reason. In the event that the Trading Floor is rendered inoperable for any reason, the electronic trading platform, if any, on which any Current Product then is traded shall serve as the venue for trading such Current Product.~~

5. ~~Moratorium on the Relocation of Current Products.~~

~~In the event that open outcry trading of any Current Product is terminated ~~subject to Section (C)(4) of this Article IV~~, the Corporation will not, nor will it cause any subsidiary to, commence open outcry trading of such Current Product in the City of Chicago for a period of 540 days following such closure (the “540-Day Moratorium”). Notwithstanding the foregoing, open outcry trading of a Current Product may commence in the City of Chicago during the 540-Day Moratorium if the Board of Directors of the Corporation approves such action and within fifteen (15) days after given written notice of such action in reasonable detail to the holders of Class A Memberships and~~

~~(1) the owners of Class A Memberships entitled to cast 10% of the total number of votes entitled to be cast at a special meeting to approve the removal of the 540-Day Moratorium for such Current Product do not make written demand for a special meeting that complies with the requirements set forth below; or~~

(2) the owners of Class A Memberships entitled to cast 10% of the total number of votes entitled to be cast at a special meeting do make written demand for a special meeting that complies with the applicable requirements listed below and at such special meeting a majority of the voting power of the outstanding Class A Memberships approves the removal of such 540-Day Moratorium.

Any notice sent by the Corporation to Class A Members in connection with a special meeting under this Section (C)(5) of this Article IV shall be accompanied by a response form through which a Class A Member may request a special meeting and the 10% threshold shall be deemed met if such forms, by themselves or collectively with one or more other written demands or petitions (which may be delivered by fax or electronically to the Secretary of the Corporation), reflect that the owners of at least 10% of the Class A Memberships are requesting a special meeting to vote on the approval of the commencement of open outcry trading in the City of Chicago of a Current Product subject to the 540-Day Moratorium. Within three (3) business days after any Class A Member so requests such a special meeting, the Secretary of the Corporation shall confirm (by fax or electronically, in addition to regular mail), to each Class A Member submitting a response form, written demand or petition, receipt of such Class A Member's request and whether the 10% threshold has, or has not, at that time been met. The written demand may also specify the date of such special meeting (in which case such meeting date shall be a business day which is not less than thirty (30) nor more than sixty (60) days from the date of such written demand).

~~6. Location of Open Outcry Trading Facility.~~

~~The Corporation shall maintain the Trading Floor at its existing location for so long as the Occupancy Agreement, dated as of May 18, 1995, among The City of New York, New York State Urban Development Corporation, New York City Economic Development Corporation, Battery Park City Authority and the Corporation, including its wholly owned subsidiary, Commodity Exchange, Inc., remains in effect, and thereafter, at another location in the Borough of Manhattan.~~

## ARTICLE V MANAGEMENT OF AFFAIRS

The following provisions are inserted for the management of the business and the conduct of the affairs of the Corporation, and for further definition, limitation and regulation of the powers of the Corporation and of its directors and members:

A. *General.*

In accordance with Sections 141(a) and 141(j) of the DGCL, the business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors of the Corporation; such power to include, without limitation, to (i) adopt, from time to time, Rules relating to criteria for eligibility for membership and procedures for becoming a member and any requirements or procedures for the acquisition or transfer of a membership as it may determine; and (ii) establish the Rules applicable to Class A Members, including, without limitation, relating to fees, financial standards and obligations for dues, assessments and fines, subject in each case to Section (C) of Article IV of this Certificate of Incorporation. In addition to the powers and authority expressly conferred upon them by statute or by this Certificate of Incorporation or the Bylaws, the directors are hereby empowered to exercise all powers and do all acts and things as may be exercised or done by the Corporation, subject, nevertheless, to the provisions of the DGCL, this Certificate of Incorporation and any Bylaws; provided, however, that no Bylaws hereafter adopted by the Class B Member shall invalidate any prior act of the directors which would have been valid if such Bylaws had not been adopted.

B. *Action by Written Consent.*

The Class A Members shall not have the right to take action by written consent in lieu of a meeting and shall have no right to initiate any proposal, at or for any meeting of members.

The Class B Member shall have the right to effect by consent in writing any action which would require the approval of the Class B Member at a duly called annual or special meeting of the Class B Member.

## ARTICLE VI BOARD OF DIRECTORS

The number of directors of the Corporation shall be as from time to time fixed by, the Board of Directors of the Corporation. Election of directors need not be by written ballot unless the Bylaws so provide.

**ARTICLE VII**  
**AMENDMENT OF BYLAWS AND RULES**

The Board of Directors of the Corporation is expressly empowered to adopt, amend or repeal the Bylaws. The Class B Member shall also have power to adopt, amend or repeal the Bylaws. The only member of the Corporation with any power to adopt, amend or repeal the Bylaws shall be the Class B Member, and no other member of, or class or series of membership in, the Corporation shall have any such power. No member of, or class or series of membership in, the Corporation shall have any power to adopt, amend or repeal the Rules.

**ARTICLE VIII**  
**LIMITATION OF LIABILITY**

No director shall be personally liable to the Corporation or any of its members for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its members, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) pursuant to Section 174 of the DGCL or (iv) for any transaction from which the director derived an improper personal benefit. Any repeal or modification of this Article VIII of this Certificate of Incorporation by the Class B Member shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification with respect to acts or omissions occurring prior to such repeal or modification.

Except for the rights expressly provided in Section (C) of Article IV of this Certificate of Incorporation and as otherwise provided under Delaware law, the Board of Directors of the Corporation will have full and absolute discretion to manage the business and affairs of the Corporation and shall have the sole and absolute right, without any duty to any Class A Member, to set and establish the rules and regulations that govern the trading and operations of the Corporation and any of its subsidiaries.

**ARTICLE IX**  
**AMENDMENT OF CERTIFICATE OF INCORPORATION**

The Corporation reserves the right to amend, modify or repeal any provision contained in this Certificate of Incorporation in the manner prescribed by the laws of the State of Delaware, and all rights conferred upon the members of the Corporation are granted subject to this reservation. Any amendment of, or modification or repeal of any provision contained in Section (C) of Article IV of this Certificate of Incorporation or this sentence of this Article IX of this Certificate of Incorporation shall require, first, the approval of the Board of Directors of the Corporation and second, the approval of a majority of the votes cast by the Class A Members. Except as provided in the immediately preceding sentence, any amendment of, or modification or repeal of any provision contained in, this Certificate of Incorporation shall require, first, the approval of the Board of Directors of the Corporation and, second, the approval of the Class B Member and no other member or series or class of membership shall have the right to vote on any such amendment or repeal.